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JAN 31 1984
ALEXANDER L. STEVAS,
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No. 83-5951

In the

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE WALTER POLOVCHAK

(STATE OF ILLINOIS,

Petitioner,

vs.

MICHAEL POLOVCHAK and ANNA POLOVCHAK,
Respondents.)

CONSOLIDATED ANSWER TO PETITIONS FOR WRIT OF CERTIORARI

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CONSOLIDATED ANSWER TO PETITIONS FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts of this case are well stated in the opinion of the Illinois Supreme Court, 97 Ill.2d 212 (1983), a copy of which is annexed to Illinois' Petition for Certiorari as Appendix "A." Stated briefly, on July 14, 1980, twelve year old Walter Polovchak left his parents' home without permission as the result of a family quarrel over whether the Polovchaks should return to their homeland in the Ukraine. R. 103. He stayed with his adult cousin and sister for five days, and was never without shelter or care. R. 118. Based on these facts

he was adjudicated a ward of the Cook County Juvenile Court on August 4, 1980. R. 5. The court found that Walter was a Minor in Need of Supervision (MINS), in that he was "beyond the control" of his parents. R. 326. The Illinois Appellate Court subsequently reversed this finding. 104 Ill. App.3d 203 (1981). The Illinois Supreme Court affirmed the reversal, adding an instruction that the trial court retain jurisdiction over Walter until his parents could resume custody. 97 Ill.2d 212, 227 (1983).

The statements of the case presented in the Petitions for Certiorari contain a number of inaccuracies. To the extent that these inaccuracies are relevant to the disposition of this matter, they will be referred to and corrected in the text or in footnotes, *infra*.

SUMMARY OF ARGUMENT

The Petitions for Certiorari should be denied because they present no substantial federal question. The relief ordered by the Illinois Supreme Court was within the power of that court and did not deny either petitioner due process of law.

ARGUMENT

I. ILLINOIS' PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

A. The Illinois Supreme Court's Remand Order Did Not Violate The Due Process Clause.

Walter Polovchak was removed from the custody of his parents on July 19, 1980, and placed in the custody of the Illinois Department of Children and Family Services (DCFS). R. 5. The Polovchak parents were unrepresented at this hearing, and the court heard no testimony before taking the child from his parents. R. 40-52; 97 Ill.2d 212, 218 (1983). This order was continued following the trial court's adjudication of wardship, and remained in effect for almost three years until the case came before the Illinois Supreme Court. 97 Ill.2d at 215. For this entire period, and at every stage of the proceedings, both the State of Illinois and Walter himself argued in favor of keeping Walter in the custody of DCFS and under the wardship of the Juvenile Court. See, e.g., R. 300, 309, 315. See also, Minor's Brief, Illinois Appellate Court at 59, 80-2857; State's Brief, Illinois Appellate Court at 48, 80-2857; Minor's Brief, Illinois Supreme Court at 69-70, No. 26552; State's Brief, Illinois Supreme Court at 37, No. 26552.

The Illinois Supreme Court, however, ruled unanimously that Walter's conduct did not fall within the scope of the Juvenile Court Act:

> It is, in our opinion, clear that, given the absence of evidence to support the finding required by

> statute, Walter should have been returned to the custody of his parents, who were in the courtroom requesting permission to take their son home. 97 Ill. 2d at 224.

The Illinois court affirmed the Appellate Court's reversal of the adjudication of wardship. 97 Ill.2d at 228. Noting that Michael and Anna Polovchak had returned to their homeland during the pendency of the case, the court fashioned its order so as to avoid turning Walter onto the street without a custodian to provide for his shelter and support. The court stated:

> We have been advised that Michael and Anna Polovchak have returned to the Ukraine. It is apparent, therefore, that Walter cannot immediately be returned to his parents, even assuming the Federal orders prohibiting his departure from this country had not been entered. We, of course, have considered only the issues before us, and our holding that the evidence before the circuit court did not support its action is dispositive only of those proceedings. Considering that, as far as we are presently informed, Federal litigation regarding the asylum and departure orders is still pending in the United States courts, we believe the appropriate disposition of this case is to remand it to the circuit court of Cook County with directions that it retain jurisdiction of Walter and this cause pending the return of Walter's parents, or either of them, to this country, in which event Walter's custody shall be given to the returning parents or parent. In the event that neither Michael nor Anna Polovchak shall return, the circuit court shall proceed in the manner it deems best suited to Walter's needs. 97 Ill.2d at 227.

Illinois' objection to this order is without merit for the following reasons: (1) the order does not offend

the Due Process Clause; (2) the issue raised by Illinois is not ripe for adjudication; (3) the state lacks standing to raise this issue; and (4) both Illinois and Walter have waived any objection to a brief continuation of wardship.

1. Due Process

The Illinois court's order was obviously entered pursuant to Illinois Supreme Court Rule 366, which allows a reviewing court to "grant any relief . . . that the case may require." Ill. Rev. Stat. ch. 110A § 366(a)(5). In this case the Court's ultimate ruling was to return custody of Walter to his parents. Since the parents were not in a position immediately to reassume custody, the case required that the transfer from DCFS to Anna and Michael be delayed until one of the parents could return to the United States. Thus, the order was in no sense a new adjudication which denied Walter due process of the law, but rather a delay of the effect of the Court's ruling in order to allow the parties to reassume the status quo ante.[1]

This action may be seen as the Illinois analogue to the principle followed by the Federal Courts that a court of review has power not only to correct errors in the judgment entered by the trial court, but also to

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[1] Furthermore, the Illinois judiciary has long exercised an inherent plenary jurisdiction to appoint guardians for minors who come before the courts. *In re Smyth*, 65 Ill. App.2d 431, 441 (1965); *In re Arnold*, 144 Ill. App.2d 348, 400 (1969). In this case, the Illinois Supreme Court's exercise of this power was reasoned and limited. The equitable continuation of guardianship was clearly circumscribed, and it provided for further judicial proceedings should neither parent return.

consider any changes which have supervened since the original judgment and to make such disposition of the case as justice currently requires.[2] See, e.g., *McLeod* v. *General Electric Co.*, 385 U.S. 533, 535 (1967); *Ithaca College* v. *NLRB*, 623 F.2d 224, 229 (2nd Cir. 1980), *cert. den.*, 449 U.S. 975 (1981); *Pendergrast* v. *United States*, 416 F.2d 776, 781 (D.C. Cir. 1967); *Brownell* v. *Kaufman*, 251 F.2d 374, 375 (D.C. Cir. 1957). Furthermore, a reviewing court may delay the effect of its ruling in order to allow for adjustment to the new situation which will follow from the ruling. This Court recently did just that when it twice stayed the effective date of its decision to hold unconstitutional certain provisions of the Bankruptcy Reform Act of 1978, in order to give Congress time to remedy the statute's deficiencies. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50; ——— U.S. ———, 103 S. Ct. 199 (1982).

2. Ripeness

The State of Illinois complains of the Illinois Supreme Court ruling that it places Walter under the control of the Juvenile Court for an indefinite period of time, "possibly until he becomes an adult." Illinois' Pet. at 2,

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[2] Ironically, the decision of the Illinois Appellate Court provided the very relief, outright reversal, which Illinois is now attempting to obtain via review by this Court. 104 Ill.App.3d at 211. The state, however, chose to open up the case by appealing that decision to the Illinois Supreme Court, thus subjecting itself to that Court's power "to direct such 'appropriate' order as it thought just under the circumstances." *Forman* v. *United States*, 361 U.S. 416, 426 (1960) (petitioner's appeal "opened up the case" for appropriate order by Appellate Court).

7, 8. This is not accurate. The Illinois Supreme Court directed the trial court to retain jurisdiction over Walter until he could be returned to one of his parents, and, should that not be possible, to "proceed in the manner it deems best suited to Walter's needs." Since Illinois requested and received a stay of the mandate, this procedure has never been initiated. Consequently, the State's parade of horribles, such as disposition without a hearing or without participation by the child's counsel, remains pure speculation.[3] *Hall* v. *Beals*, 396 U.S. 45, 49 (1969) (speculative contingencies afford no basis for passing on substantive issues); accord, *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 fn. 5 (1974).

Needless to say, any action taken by the trial court on remand which is objectionable to the child or the state would be subject to direct appeal in the Illinois Courts. Ill. Rev. Stat. ch. 110A §§ 303, 662. There can, however, be no review based upon what the trial court might do. 28 U.S.C. § 1257. See also, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1948) (no appeal from decision which is tentative or incomplete); *United States* v. *Associated Air Transport, Inc.*, 256 F.2d 857, 861 (5 Cir. 1958) (no appeal from conditional order which depends on contingencies).

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[3] It should be obvious that the direction to the trial court to proceed in the manner best suited to Walter's needs calls for a judicial hearing accompanied by due process safeguards. When this Court remands a case with "directions to proceed in a manner not inconsistent with the Court's opinion" it is understood by all parties that the Due Process Clause obtains to the further proceedings as they are conducted by the court below.

3. Standing

Illinois premises its entire argument concerning the propriety of the remand order on the asserted violation of Walter's due process rights. Since Walter is separately represented in this matter, indeed he was named as the respondent in the state's original juvenile petition, it is apparent that Illinois lacks standing to assert the alleged violation of his rights. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973). While the State may have a *parens patriae* duty or power to protect its minor citizens, this does not confer standing upon the Attorney General to assert every conceivable issue on behalf of every child who finds himself in litigation. This is particularly the case where the State is the party which initiated the lawsuit; to rule otherwise would be to allow the State to confer standing upon itself. *Pennsylvania ex rel. Rafferty* v. *Philadelphia Psychiatric Center,* 356 F. Supp. 500, 505 (E.D. Pa. 1973) (state may not sue as *parens patriae* unless substantial number of inhabitants are injured and state has separate and distinct injury); *Pennsylvania* v. *Kleppe,* 533 F.2d 668, 675 (D.C. Cir. 1976), *cert. den. sub nom., Pennsylvania* v. *Kobelinski,* 429 U.S. 977 (1976) (state has no standing to sue on behalf of individual or even narrow class of individuals); See, also, *Pennsylvania* v. *New Jersey,* 426 U.S. 660 (1976) (state may not litigate personal claims of its citizens).

The cases cited by Illinois to bolster its standing do not support that proposition. *Kent* v. *United States,* 383 U.S. 541, 554-55 (1965), does note that a state may stand in *parens patriae* to a child, but goes on to say that this is not an excuse for procedural irregularity; the case does not discuss standing at all. The Illinois

Supreme Court, however, has held that the function of the State's Attorney under the Illinois Juvenile Court Act is to represent the People, that is to say, *not* the child. *In re Jennings*, 68 Ill. 2d 125, 135 (1977); Ill. Rev. Stat. ch. 37, § 701-21.

As if to recognize its own lack of standing, Illinois concluded its standing section with the apologia that, in any event, Walter would file his own Petition for Certiorari. Ill. Pet. at 14. It is true that Walter has standing to raise the instant issue. The fact, however, is that he has sought Certiorari on wholly separate grounds. Minor's Pet. at 3. Save for an oblique reference in one footnote to the effect that he "supports" the state's Petition, Walter has not requested that this Court review the Illinois Supreme Court's remand order. Minor's Pet. at 9 fn. 2.

4. Waiver

Both Illinois and Walter himself consistently have argued that Walter should be a ward of the Juvenile Court. The State initiated a lawsuit seeking this relief; Walter specifically acceded to that petition and waived his right to contest wardship. R. 5, 9, 81-85. Indeed, Walter's Petition for Certiorari seeks a full remand and a new trial in order to establish his asserted "right" to be a ward of the Juvenile Court. Under these circumstances, both the State and Walter have waived any objection to a temporary and equitable continuation of the Juvenile Court's jurisdiction over the child. *Southern Pacific Co.* v. *Brotherhood of Locomotive Firemen*, 393 F.2d 345, 348 (D.C. Cir. 1967), *cert. den.* 391 U.S. 913 (1968) (railroads which had invoked court's jurisdiction to obtain injunction would not be heard to con-

test court's authority to impose condition on injunction). In short, Illinois has for the last 3½ years argued for extraordinary and extensive judicial intrusion into the life of the Polovchak family; the state is now in no position to argue against the Court's limited exercise of equitable power so as to return the parties to their original positions.

B. Certiorari Should Not be Used As a Device for Delay or Manipulation of the Judicial System.

Illinois' second argument is that this Court should grant Certiorari "in order to prevent the forcible and illegal removal of Walter Polovchak from the United States." Ill. Pet. at 15. This argument is made absolutely without legal or factual support. It can only be seen as an abuse of the Petition for Certiorari.

That the question of Walter's removal from the United States is not at issue in this litigation has been recognized by every Illinois court which has reviewed this case. 104 Ill. App.3d 203, 210 (1981); 97 Ill.2d 212, 227 (1983). Furthermore, the precise question of Walter's immigration status is now pending before the United States District Court for the Northern District of Illinois.[4]

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[4] *Polovchak* v. *Smith*, filed by Anna and Michael against the Attorney General and others, seeks a determination as to whether the grant of asylum to then 12-year old Walter was lawful, in that the parents received no notice or opportunity to participate in the proceeding. It also challenges the Administration's position that the grant of asylum prevents the parents from returning their child to their homeland, now that the Illinois courts have restored their full parental rights.

The Minor has filed a lawsuit, *Polovchak* v. *Polovchak*, 82 C 2327, which seeks a declaration that the grant of asylum absolutely prevents his removal from the United

Polovchak v. *Smith*, No. 80 C 5595. The State of Illinois has no interest in the federal question of the nature and consequence of Walter's status under the Immigration and Nationality Act. *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) (classification on basis of alienage not a basis for state's interests).

The suggestion that Walter's parents intend to remove him from the United States in violation of the law is unsupportable and is completely at odds with the record in this case. Anna and Michael Polovchak have been subjected to the loss of custody of their child for over three years, notwithstanding the fact that the trial court's initial removal of their child was in violation of the Illinois Juvenile Court Act. 97 Ill.2d at 224, 226. Throughout this entire ordeal they have respected and obeyed the law; the state can point to no fact which indicates otherwise. It is manifestly unsupportable to suggest now that they intend to determine their child's future by force and not by law. Ill. Pet. at 16.

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[4] (Continued)

States. That suit was dismissed for lack of personal service and is now pending before the Seventh Circuit. No. 83-1118. Additionally, the minor has presented the same issues as a counterclaim in *Polovchak* v. *Smith*.

Finally, certain relatives have initiated two lawsuits in the Circuit Court of Cook County. Walter's aunt and uncle filed and voluntarily dismissed an adoption action, seeking to terminate the Polovchaks' parental rights and to adopt Walter as their son. *In the Matter of the Petition of John Junko and Anastasia Junko, Husband and Wife, to Adopt Walter Polovchak, a Minor*, No. 81 CoA 1956. Walter's cousin has also filed a lawuit seeking custody of the minor for himself. *In re Custody of Walter Polovchak*, No. 82 D 7175, which is presently pending.

The hollowness of Illinois' position is made apparent by the fact that it neither requests nor suggests what actual relief it seeks, should Certiorari be granted pursuant to its second argument. The fact must be that the state is not seeking relief on the merits, but only delay.[5] This Court should not allow its jurisdiction to be so misused.

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[5] Indeed, the first paragraph of Illinois' Statement Of The Case reveals that the instant petition is brought for purposes which would misuse the jurisdiction of this court. The statement begins:

> Walter Polovchak is a sixteen year old boy who wants to remain in the United States. His parents want him to be forcibly deported to the Soviet Union. The State of Illinois has been cooperating with Walter and his attorneys in the Illinois courts in an effort to keep him from being forcibly deported. Ill. Pet. at 2.

Thus, the State of Illinois has admitted, for the first time in the history of this litigation, that its underlying purpose is not to enforce the provisions of the Illinois Juvenile Court Act, but rather to prevent Anna and Michael Polovchak from exercising their choice of residency with their family. Viewed in this light, the arguments proffered by Illinois in support of Certiorari can only be seen as another attempt to prolong this litigation as an end in and of itself.

In any event, Illinois' Statement of the Case is factually inaccurate. This case presents no issue of deportation, forcible or otherwise. The sole issue in the state court litigation was the correctness of adjudicating Walter a ward of the Illinois Juvenile Court. *In re Polovchak,* 97 Ill.2d 212 (1983).

II. WALTER POLOVCHAK'S PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED SINCE THE ILLINOIS SUPREME COURT DID NOT ERR IN REVERSING THIS CASE WITHOUT REMAND FOR A NEW TRIAL.

The sole argument raised in the minor's Petition for Certiorari is that the Illinois Supreme Court erred by reversing the case outright, rather than remanding it for a new trial. Since the reversal was based upon the inadequacy of the evidence, however, reversal is entirely appropriate and a new trial is not necessary.

Initially, it must be noted that the minor's argument is based upon the fallacious premise that he may seek Certiorari based upon language found in the opinion of the intermediate appellate court. Minor's Pet. at 5-7. For the purpose of Certiorari, however, that opinion has been superceded by the ruling of the Illinois Supreme Court. 28 USC § 1257; *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, 402 n. 3 (1958); *Wolfe* v. *North Carolina*, 364 U.S. 177, 194-95 (1960). Thus, the minor's petition is wide of the mark in complaining that the Appellate Court attached "two brand new provisos" to the Illinois Juvenile Court Act.[6] Minor's Pet. at 5. The operative opinion is that of the Illinois Supreme Court, which makes it clear that the reason for the reversal was that the minor's conduct did not fall within the ambit of the Juvenile Court Act. 97 Ill.2d at 226.

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[6] The Minor's Petition was also inaccurate in stating that no party requested that the Appellate Court construe the term "beyond control," Minor's Pet. at 5. The parents briefed this issue fully in the Illinois Appellate Court. Parents' Brief, Illinois Appellate Court at 31-39, No. 80-2857.

The Illinois Supreme Court held:

> Although the parties characterize the evidence differently and disagree as to its legal sufficiency, as the appellate court noted, no material facts were in dispute. With the help of his sister and cousin, Walter, a 12-year-old boy, left his parents' home without their consent and spent the next few days with his older sister at his cousin's apartment. This occurred during a time of considerable family tension regarding the Polovchaks' decision to return to their homeland. Neither psychiatrist, testifying in response to hypothetical questions based on these and other relevant facts, believed that Walter was beyond the control of his parents. We believe the appellate court correctly concluded that the trial court's decision was against the manifest weight of the evidence. Walter's actions, which can hardly be characterized as those of a runaway, and posed no hazard to him or anyone else, simply do not establish that he was beyond parental control. 97 Ill.2d at 226.

The offending provisos upon which the minor's petition is based simply do not appear in the relevant opinion.

It is well settled law that a reviewing court may order an outright reversal based upon the legal insufficiency of the evidence, particularly where the facts are undisputed, without ordering remand for a new trial. In *Rowoldt* v. *Perfetto,* 355 U.S. 115 (1957), for example, this Court reviewed the evidence which supported an order of deportation against the defendant for having been a member of the Communist Party. Applying the standard of "meaningful association" to the undisputed facts in the record, this Court concluded that the evidence was "too insubstantial to support the order of deportation." The Court reversed without remand. 355 U.S. at 121. More

recently, this Court in *Fedorenko* v. *United States,* 449 U.S. 490 (1981), affirmed a reversal without new trial which had been entered by the Fifth Circuit. In *Fedorenko* the District Court initially ruled against the government's petition to denaturalize the defendant, based upon an interpretation of the Immigration and Nationality Act of 1952. 455 F.Supp. 893, 921 (S.D. Fla. 1978). On appeal, the Fifth Circuit, having arrived at a contrary interpretation of the Immigration and Nationality Act and having reviewed the facts in the trial court record, reversed without remand for a new trial and ordered that the District Court enter judgment denaturalizing the defendant. 597 F.2d 946, 954 (5th Cir. 1979). This Court affirmed the Fifth Circuit, revoking Fedorenko's citizenship without a second trial. 449 U.S. at 518. See also, *Girouard* v. *United States,* 328 U.S. 61 (1946).

The minor's reliance on *Saunders* v. *Shaw,* 244 U.S. 317 (1917), is misplaced since that case involved a party who had been denied the opportunity to present evidence. 244 U.S. at 319. In the instant case, as the Illinois Supreme Court noted, "[t]he record shows that neither the state nor Walter was prevented from presenting any evidence relevant to the determination of whether Walter was beyond his parents' control." 97 Ill.2d at 227. The minor's Petition for Certiorari does not point to a single instance where he attempted to offer evidence to the trial court and was refused.

Finally, the minor's argument that the Illinois Supreme Court imposed a new standard, while he relied on "the old standard," is entirely without merit. Minor's Pet. at 7. Prior to this case there was no appellate decision in Illinois which construed the phrase "beyond the control" of one's parents. 97 Ill.2d at 244. Thus, there was

no "old standard" upon which the minor could have relied. There were, however, numerous cases in Illinois and other jurisdictions which held that a single act of non-serious misbehavior could not form the basis of a juvenile adjudication. See, e.g., *In re R.R.*, 92 Ill.2d 423 (1982); *In re Baker* 71 Ill.2d 480 (1978); *In re Sekeres* 48 Ill.2d 431 (1971), appeal dismissed 404 U.S. 1008 (1972); *In re Presley* 47 Ill.2d 50 (1970); Cf. *In re G.B.* 88 Ill.2d 36 (1981), *cert denied*, 456 U.S. 963 (1982); Ill. Rev. Stat. 1979, ch. 37, par. 702-3(b)); Pub. Act 82-969 (minor requiring authoritative intervention), eff. Jan. 1, 1983. See also, *In re Snyder* 85 Wash. 2d 182 (1975); *In re D.J.B.* 18 Cal. App.3d 782 (1971); *In re Galvan* (La. App.), 384 So. 2d 1000 (1980). The Illinois Supreme Court relied upon these opinions in deciding this case. 97 Ill.2d at 225-26.

Walter's attorneys were on notice from the outset of this litigation that the construction of the MINS statute was at issue. *Bouie* v. *Columbia*, 378 U.S. 673 (1930); *Brankerhoff-Faris Transit Co. & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). They had every opportunity to present whatever proof they possessed. If they deliberately chose to hold back some of their evidence it was done for tactical purposes, and their intentional litigation strategy cannot now form the basis for a grant of Certiorari.

III. THIS CASE PRESENTS NO ISSUE OF GENERAL IMPORTANCE.

The central issue on the merits in this case is the construction of the Illinois "Minor In Need Of Supervision" statute as it existed in 1980. That statute, however, was repealed as of January 1, 1983. Ill. Rev. Stat. ch. 37 § 702-3(b); Pub. Act 22-969, eff. Jan. 1, 1983.

Thus, the circumstances of this case can never re-occur and no decision on the merits can have any prospective import.

CONCLUSION

For the reasons stated above, respondents respectfully submit that the Petitions for Certiorari should be denied.

Respectfully submitted,

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